
(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:

Environmental Disposal Systems, Inc.

UIC Permit Nos.: M1-163-1W-C007
M1-163-1W-C008

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UIC Appeal Nos. 98-1
& 98-2

[Decided October 15, 1998]

ORDER DENYING REVIEW

*Before Environmental Appeals Judges Ronald L. McCallum
and Edward E. Reich.*

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2) The alleged delay in making the permits available at local libraries did not prejudice Ms. Yerman as she was given a total of 36 days to review the final permit and file her appeal, six days more than required by the applicable regulations; and

3) The fact that the permits were not signed by the Director of the Region V Water Division does not serve as a basis for Board review because the permits were signed by the Director's authorized representative.

Basham Petition: 1) Mr. Basham has failed to convince the Board that the absence of a monitoring schedule for likely waste sources is erroneous or otherwise warrants review;

2) Mr. Basham's assertion that MDEQ data on the presence of deep wells in the area were unreliable is unsupported by the record. Moreover, the Region did not rely solely on data supplied by MDEQ. Thus, the Board is not convinced that the Region's conclusion regarding the absence of deep wells in the area was erroneous;

3) Pursuant to 40 C.F.R. § 144.41(e), "a [c]hange [in the] quantities or types of fluids injected which are within the capacity of the facility as permitted and, in the judgment of the director, would not interfere with the operation of the facility or its ability to meet conditions described in the permit and would not change its classification" is considered a minor permit modification. Thus, to the extent that Mr. Basham argues that changes in the quantities or types of fluids should not be considered a minor permit modification, he is essentially challenging the validity of the UIC regulations. As a permit appeal is not an appropriate forum in which to present such a challenge, review is denied on this issue;

4) Because Mr. Basham's concern that MDEQ does not have adequate staff or financial resources to properly oversee the proposed wells does not challenge the validity of any particular provision of the EDS permits, it fails to satisfy a basic prerequisite for obtaining Board review under 40 C.F.R. § 124.19, namely, the identification of a specific permit term that is claimed to be erroneous. Moreover, because EPA rather than the State is primarily responsible for the enforcement of UIC requirements in Michigan, Mr. Basham's objection is misdirected; and

5) Mr. Basham's objection to the Region's Environmental Justice determination is rejected as a basis for review. As the Board has previously stated, the Region has broad discretion to determine the proper scope of a demographic study. *In re Envotech, L.P.*, 6 E.A.D. 260, 283 (EAB 1996) (quoting *In re Chemical Waste Management of Indiana, Inc.*, 6 E.A.D. 66, 80 (EAB 1995)). Mr. Basham has failed to establish that the Region's determination in this regard was erroneous or otherwise warrants review.

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The Region issued draft permits for the injection wells on August 21, 1997, and solicited public comments from September 3 through October 24 1997. A public hearing was held on October 9, 1997, in which both petitioners participated. See Exhibit ("Exh.") B to Region's Response (transcript of public hearing). The Region issued the final permits on March 18, 1998 (Exh. E to Region's Response), along with a document responding to comments received during the comment period. Response to Comments (Exh. D to Region's Response). These petitions for review followed. See 40 C.F.R. § 124.19 (Appeal of RCRA, UIC, and PSD Permits).

II. DISCUSSION

Under the rules governing this proceeding, a UIC permit decision will ordinarily not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a). As the Board has stated on numerous occasions, the Board's power of review should be "sparingly exercised" and "most permit conditions should be finally determined at the Regional level." *In re NE Hub Partners, L.P.*, UIC Appeal Nos. 97-3 & 97-4, slip op. at 9 (EAB, May 1, 1998), 7 E.A.D. ____ (quoting 45 Fed. Reg. 33,290, 33,412 (May 19, 1980)). The burden of demonstrating that review is warranted rests with the petitioner who challenges the Region's permit decision or the conditions contained in the permit. See 40 C.F.R. § 124.19(a); *In re Envotech, L.P.*, 6 E.A.D. 260, 265 (EAB 1996).

Petitioners raise numerous objections to the Region's permit decision in this matter. After careful consideration of the arguments raised in the petitions for review, the Region's and EDS's responses, and the relevant portions of the administrative record underlying the permit decisions, the Board concludes that petitioners have not met the standards necessary to invoke Board review. Thus, for the reasons stated below, the petitions for review are denied.

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C.F.R. § 124.19(a) ("The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice."). Ms. Yerman does not dispute that the final permits were made available for viewing at the Romulus Public Library and the Taylor Community Library by March 26, 1998. Thus, Ms. Yerman had a total of 36 days to review the final permits and file her petition for review with the Board, six days more than required by the applicable regulations. We therefore conclude that Ms. Yerman was not prejudiced in any way by the Region's alleged delay in making the permits available for viewing. Accordingly, review is denied on this issue.

Issue 3: Ms. Yerman questions the appropriateness of Rebecca L. Harvey signing the permits for Jo Lynn Traub, Director of the Water Division, and asks whether this makes any difference to the Board.

As the Region makes clear in its response, at the time the permits were issued, Rebecca Harvey, Chief of the Region V Underground Injection Control Branch, had the delegated authority to sign final UIC permits as the Acting Water Division Director. See Memorandum from Jo Lynn Traub, Director, Water Division, to Rebecca L. Harvey, Chief, Underground Injection Control Branch, (Oct. 10, 1995) ("Designation of Acting Division Director") (Exh. I to Region's Response). Thus, contrary to Ms. Yerman's suggestion, we find nothing improper or erroneous regarding Ms. Harvey's signature on the permits.

Issue 4: Ms. Yerman asserts that certain testing requirements in Attachment A to the permits (Summary of Operating, Monitoring, and Reporting Requirements) should be amended to require testing for the presence of bacteria in the injected wastes. In particular, Ms. Yerman argues that such a testing requirement should be added to the Waste Source Characterization provisions in section D.1. and the Fingerprint Analysis Provisions in Section G. Petition at 7.

Ms. Yerman appears to have raised this or a similar issue in her comments on the draft permits. Specifically, in her written comments Ms. Yerman stated:

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Issue 5: In Attachment B (Closure Plan) to the permits, the cost for plugging the injection wells after closure is estimated at \$19,500. Ms. Yerman states that the Board should review this provision, presumably because she considers this amount insufficient.

As the Region states in its response, however, EDS provided a written estimate of the cost for plugging the wells in accordance with 40 C.F.R. § 144.62 (Cost estimate for plugging and abandonment). See Attachment B to permits at B-7. The Region further states that it "carefully reviewed [EDS's] submission and determined the cost estimate to be adequate." Region's Response at 24. Nothing in the petition for review or in the record before us indicates that the Region's determination in this regard was erroneous or otherwise warrants review. Review is therefore denied.

Other Issues: Ms. Yerman raises the following additional issues in her petition: 1) the Board should review all references in the permits to 40 C.F.R. Parts 136, 141, 261, 262, 268, "and Part 2!" Petition at 3; 2) the Board should review whether the permits should have made reference to section 3004(a) of the Resource Conservation and Recovery Act ("RCRA"); 3) the Board should review whether provision I.D. of the permits, allowing the permittee to claim certain information as confidential, complies with the applicable regulations; 4) permit condition I.E.6. (Proper Operation and Maintenance) should be removed from the permit; 5) the permittee should be required to retain records concerning the nature and composition of injected fluids for a period longer than the three years required by condition I.E.9(c) of the permits; 6) the Board should

⁵(...continued)

pleading requirements, a petitioner must nevertheless comply with the minimal pleading standards and articulate *some* supportable reason why the Region erred in its permit decision in order for the petitioner's concerns to be meaningfully addressed by the Board.

Envotech, 6 E.A.D. at 268 n.13 (quoting *In re Beckman Production Services*, 5 E.A.D. 10, 19 (EAB 1994)).

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review is denied.

B. Raymond E. Basham Petition

Issue 1: In response to a comment arguing that the permit should include more frequent monitoring for hazardous waste sources than for non-hazardous sources, and that the permit should require weekly rather than quarterly hazardous waste sampling, the Region stated:

The sampling and monitoring frequency is determined separately for each source. Some sources may be monitored quarterly, monthly, or weekly, depending on the contents of the waste and the potential variability of the source * * *. Each waste stream will be carefully reviewed and the sampling and monitoring determined by the USEPA as each source is approved.

Response to Comments at 14. With regard to EPA's statement that each waste stream will be carefully reviewed before a waste source is approved, Mr. Basham asserts that because the permits include a list of likely waste sources, the permits should also include a monitoring schedule for these likely sources "to give the public some understanding of the extent of monitoring they can expect from the USEPA." Basham Petition at 1.

Although Mr. Basham is correct that the permits do not contain monitoring requirements for specific waste sources (as these sources have not yet been approved), our review of the permits indicates that, contrary to Mr. Basham's suggestion, the permits do contain provisions sufficient to inform the public of the type of monitoring expected by EPA. For example, Condition I.E. (Duties and Requirements) of the permits states, in part:

⁷(...continued)

becomes final." *Brine Disposal*, 4 E.A.D. at 740 (quoting *In re Renkiewicz SWD-18*, 4 E.A.D. 61, 64 (EAB 1992)). Any issues not previously raised may not be raised on appeal except to the extent that these issues concern changes from the draft to the final permit decision. 40 C.F.R. § 124.19(a).

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measurements of injection pressure and annulus pressure
for each day of the month; * * *.^[8]

Finally, Attachment A to the permits states, in part:

G. Periodic Monitoring of Approved "Sources"

Oilfield Brine Wastes

All approved oilfield brine wastes shall be monitored at a minimum for the following parameters: Sodium, Calcium, Magnesium, Barium, Total Iron, Chloride, Sulfate, Carbonate, Bicarbonate, Sulfide, Total Dissolved Solids, pH, Resistivity (ohm-meters @ 75 °F), and Specific Gravity.

Fingerprint Analysis

All wastes that require fingerprint analysis as specified in [Permit Attachment E] shall, at a minimum, be subject to tests for the following:

pH, Total Settleable Solids, Temperature, Color, Flashpoint, Conductivity, Specific Gravity, Odor, and any other analysis deemed appropriate for characterizing the injected waste.

Permit Attachment A at A-6.

Under these circumstances, we agree with the Region that the permits are sufficient to ensure compliance with the SDWA and its implementing regulations, and to give the public an understanding of the type of monitoring expected by the Agency. Nothing in Mr. Basham's petition convinces us that the absence of additional monitoring requirements for likely waste sources is clear error or an important policy

⁸See also Permit Conditions II.D.2. (Quarterly Reports), II.D.3. (Annual Reports), and II.D.4 (Reports on Well Tests and Workovers).

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Michigan Department of Environmental Quality ("MDEQ") to determine the existence of all of the wells in the area. Basham Petition at 2. Thus, according to Mr. Basham, EDS should be required to conduct a survey of the area surrounding the injection wells to determine what other wells may exist. Basham Petition at 2. For the following two reasons, we disagree.

First, Mr. Basham has failed to provide any support for the assertion that MDEQ data regarding the presence of deep wells in the AOR were unreliable. Second, the Region did not rely solely on information supplied by MDEQ. Rather, as the above-quoted response indicates, MDEQ data were among several sources of information on the existence of deep wells in the AOR. Thus, even if we were to accept Mr. Basham's assertion that MDEQ has "no information whatsoever regarding hundreds of thousands of wells in Michigan," (Basham Petition at 2) we are not convinced that the Region's conclusion regarding the absence of deep wells in the AOR was erroneous. Moreover, the Region has stated that should new evidence reveal the presence of wells that could result in the migration of fluid out of the injection zone, the wells will be investigated and EDS will be required to ensure that any problems are corrected. Response to Comments at 11. Review is therefore denied on this issue.

Issue 3: In responding to a comment on the draft permit asking whether the Region would hold a public hearing once the specific waste sources are identified and incorporated into the permit, the Region stated:

The waste to be injected cannot be identified at this time. Because the well is a commercial operation, EDS cannot determine the waste stream until specific customers are determined.

* * * * *

Under the UIC regulations at § 144.41, minor modifications of the permit do not require public notice. Changing the quantities or types of fluids injected would be defined as a minor modification of the permit, as long

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40 C.F.R. § 144.41(e).¹⁰ Thus, to the extent that Mr. Basham argues that changes in the quantities or types of fluids should not be considered a minor permit modification, he is essentially challenging the validity of the UIC regulations. As a permit appeal is not an appropriate forum in which to present such a challenge, review is denied on this issue. *See Suckla Farms*, 4 E.A.D. at 699 (declining to review a challenge to the UIC regulations in the context of a permit appeal).

Issue 4: Mr. Basham expresses concern that MDEQ does not have adequate staff or financial resources to properly oversee the proposed wells. However, as this concern does not challenge the validity of any particular provision of the EDS permits, it fails to satisfy a basic prerequisite for obtaining Board review under 40 C.F.R. § 124.19, namely, the identification of a specific permit term that is claimed to be erroneous. *Federated Oil & Gas*, 6 E.A.D. at 730. Moreover, because EPA rather than the State is primarily responsible for the enforcement of UIC requirements in Michigan, Mr. Basham's objection is misdirected. *See Envotech*, 6 E.A.D. at 274 n.19.¹¹

Issue 5: In reaction to community concerns that the proposed wells would have a disproportionate impact on minority communities, and in accordance with the President's Executive Order on Environmental Justice (Executive Order 12898),¹² the Region performed

¹⁰We note further that pursuant to 40 C.F.R. § 144.39, "for 'minor modifications' the permit may be modified without a draft permit or public review."

¹¹We note further that Mr. Basham's contention appears to be predicated on the assumption that the Board is authorized to go beyond an assessment of the permit's validity under the SDWA and its implementing regulations, and to rule on the permit's implementation and enforcement. The Board has no such authority. *Brine Disposal Well*, 4 E.A.D. at 746.

¹²The Executive Order mandates that:

To the greatest extent practicable and permitted by law, * * * each Federal agency shall make achieving environmental justice part of
(continued...)

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Environmental Justice Determination at 5.

As the Board has previously explained:

The proper scope of a demographic study to consider such impacts is an issue calling for a highly technical judgment as to the probable dispersion of pollutants through various media into the surrounding community. This is precisely the kind of issue that the Region, with its technical expertise and experience, is best suited to decide.

Envotech, 6 E.A.D. at 283 (quoting *In re Chemical Waste Management of Indiana, Inc.*, 6 E.A.D. 66, 80 (EAB 1995)). Accordingly, we reject Mr. Basham's assertion that the two-mile area in which the Region conducted its demographic analysis was too small. *Id.* (rejecting challenge to two-mile demographic analysis).

Issue 6: Finally, Mr. Basham states that he agrees with the comments summarized by the Region in "Comment 56" on pages 23-24 of the Response to Comments document regarding the disproportionate impact of the proposed wells. In particular, Mr. Basham, citing the Region's Environmental Justice Guidelines, argues that the Region should consider the "aggregate impact of the proposed commercial hazardous waste disposal facility along with the existing Detroit Metropolitan Airport, numerous airport-related trucking firms, three petroleum tank farms, asphalt plant and the major interstate highway." Basham Petition at 3.

In its response to this comment, the Region stated that it had conducted an Environmental Justice review and concluded that operation of the proposed wells would not result in a disproportionate impact on minority communities. The Region stated, in part:

USEPA remains committed to ensuring, to the greatest extent practicable and permitted by law, that the implementation of its regulatory program does not

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III. Conclusion

For the reasons stated above, the petitions for review are denied in all respects.

So ordered.